In the Supreme Court

OF THE

United States

OCTOBER TERM, 1943

No. 636

JAMES W. BUTLER, MARY L. BUTLER, MARY SEQUIN, CLARA VERSCHOOR, LILLIAN FITZGERALD, DAVID J. LEWIS, ELIZABETH A. LEWIS, JOHN LINGIE SMITH, ELLA RUTH SMITH, PATRICK J. LEONARD, ANNIE LEONARD, STEPHEN C. PERRY, CARLE HILLEBRAND, MRS. C. C. E. HILLEBRAND, FRED HUSSEY, MRS. H. L. GOOCH, OSCAR SWANSON, MARVIN WALTER WAFER, GEORGE W. IRVINE, BETTY DU BOIS, MRS. I. B. BRAWLEY, MARGARET JOHNSTONE, JAMES J. PHELAN, J. H. PEGRAM, MRS. J. H. PEGRAM, MARIE C. KNIEF, AMOS WASHINGTON, DOROTHY LEWITZ, MARIE C. CROSS, VIOLETTE M. CROSS, CHARLES L. FORSEBERG, and MAIDGE MCNAUL, *Respondents,*

vs.

GRACE APPLETON MCKEY, *Petitioner.*

PETITION FOR WRIT OF CERTIORARI to the United States Circuit Court of Appeals for the Ninth Circuit and BRIEF IN SUPPORT THEREOF.

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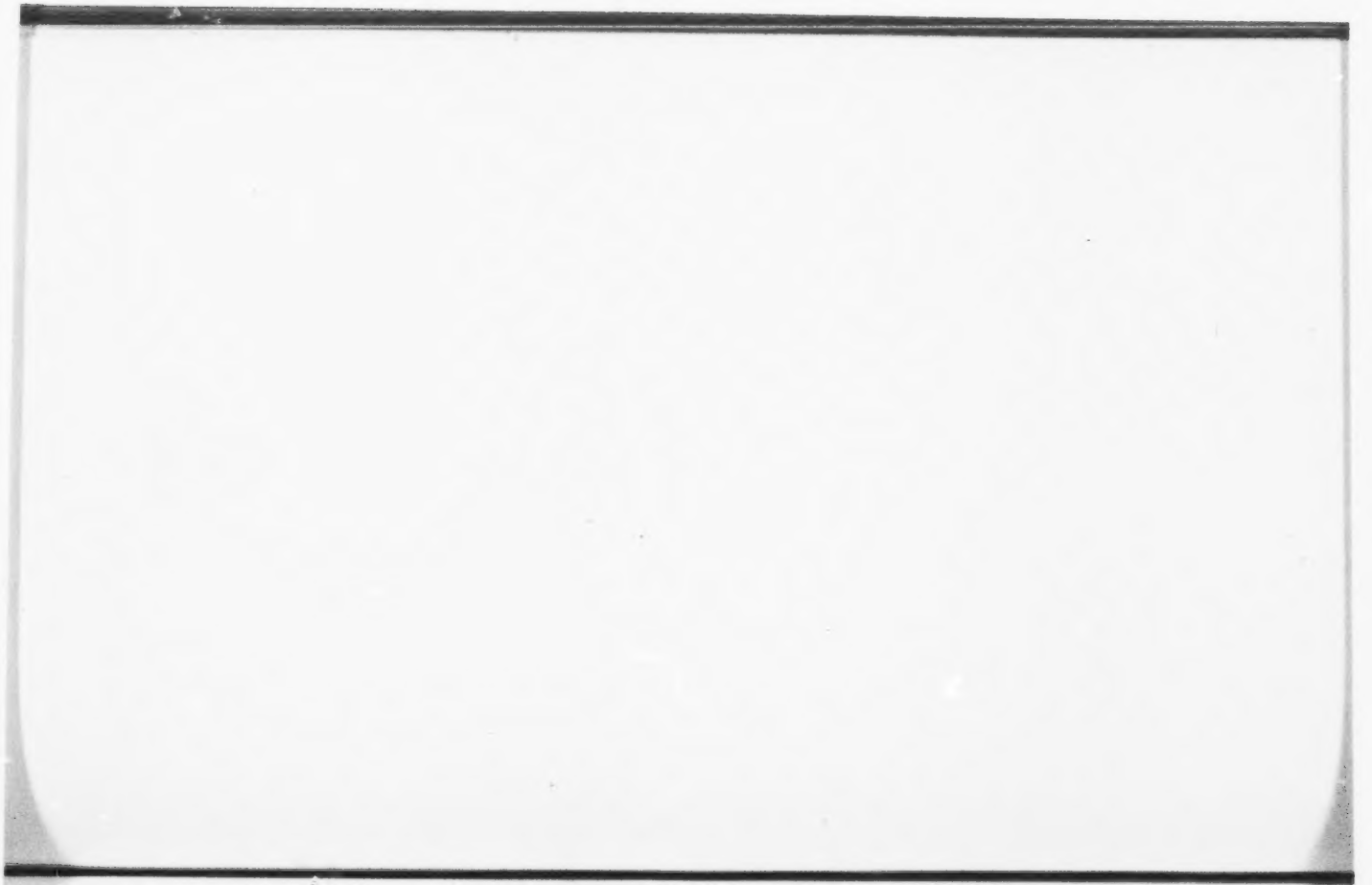

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PETITION FOR WRIT OF CERTIORARI
to the United States Circuit Court of Appeals
for the Ninth Circuit.

To the Honorable Harlan Fiske Stone, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

Your petitioner, Grace Appleton McKey, respectfully shows that:

Rule 4 (d) of the "Federal Rules of Civil Procedure for the District Courts of the United States" which prescribes the manner of serving a summons in a case before a District Court (after providing for personal services on defendants falling into various classifications), declares under subdivision "7" thereof, that as to individuals or corporations,

> "it is also sufficient if the summons and complaint are served in the manner prescribed by any statute of the United States or in the manner prescribed by the law of the State in which service is made for the service of summons or other like process upon any such defendant in an action brought in the Courts of general jurisdiction."
>
> (28 U. S. C. A. Sec. 723 (c), p. 383.)

There is no federal statute providing for service upon defendants who cannot be found within the district or state in which the action is filed. Appellees therefore, under the authority of the above quoted rule, sought to secure service by publication under Section 412 of the *Code of Civil Procedure of California,* the pertinent portions of which reads as follows:

> "Where the person on whom service is to be made resides out of the State; * * * cannot,

after due diligence, be found within the State; or conceals himself to avoid the service of summons; * * * and the fact appears by affidavit to the satisfaction of the court, or a judge or justice thereof; * * * such court, judge, or justice, may make an order that the service be made by the publication of the summons; provided, that where service is sought to be made upon a person by publication upon the ground that he cannot, after due diligence, be found, within the State, it must first appear by the affidavit aforesaid that there has not been filed, on behalf of such person, either in the county in which such action was brought, or in the county in which such action is pending, the certificate of residence provided for by section 1163 of the Civil Code; or that said certificate was so filed and that the defendant cannot be found at the place named in said certificate, which latter fact must be made to appear by the certificate, of the sheriff, or a constable or marshal, of the county wherein said defendant claims residence in and by said certificate of residence, * * *."

This petition is concerned with the interpretation of the word "affidavit" which appears in several places in the code section last quoted. Petitioner contends that it is the law of California, as fixed by the decisions of the highest Courts of California, that the filing of an "affidavit", *based upon hearsay,* is not a compliance with the code section. The Circuit Court of Appeals in this case holds to the contrary, hence this petition.

SUMMARY OF POINTS INVOLVED.

The action is a stockholders' liability suit, growing out of the failure of an Illinois bank in June 1932. (R. 8.) It was filed in the United States District Court in California on November 19, 1936 (R. 31), more than four years after the liability accrued through the bank failure.

Since federal Courts follow the state statute of limitations (*Benedict v. New York,* 250 U. S. 321, at 327) and the action was brought in California, the law of this state is applicable. The action is either one on contract (as claimed in respondents' complaint, R. 19) or one upon statute. The California statute of limitations prescribes a period of four (4) years in which actions on written contracts must be instituted (Sec. 337, Code of Civil Procedure of California), and a period of 3 years in which an "action upon a liability created by statute, other than a penalty or forfeiture," can be commenced. (Sec. 338 (1) of the same Code.) Respondents' cause of action therefore was outlawed.

On January 16, 1939, respondents presented to the judge of the District Court an "affidavit for Order for Publication" (R. 46) and moved for and secured from the District Judge, forthwith, an "order for Publication of Summons" (R. 60), which directed publication in a legal journal. (R. 61, 70.)

On April 18, 1939, following publication of the summons the Clerk of the District Court signed and entered "Judgment by Default of Clerk," in the sum of $110,886.63 plus costs. (R. 67.) Petitioner

first learned of the fact that judgment had been taken against her about June 15, 1942. (R. 76.) Had she been served she could have secured a dismissal on the ground of the outlawry of the claim.

On July 23, 1942, petitioner moved the District Court for an order quashing the service of summons upon the ground, among others, that

> "the order * * * directing publication of summons * * * does not comply with Sec. 412 of the Code of Civil Procedure * * * in that the alleged facts in the affidavit of Fred S. Herrington upon which the order is based, are predicated not on the affiant's knowledge, but upon hearsay." (R. 70.)

Accompanying the moving papers was a memorandum of authorities, which included three California decisions declaring orders based upon hearsay affidavits to be void. (R. 73, 74.)

On December 5, 1942, the Judge of the District Court made an order quashing the service of summons and vacating the said default judgment. (R. 91, 92.)

THE POINT WAS PRESENTED TO THE CIRCUIT COURT OF APPEALS.

The Court of Appeals, after stating the question before it in the following language:

> "In 1942, more than three years after entry of judgment, appellee moved the court to quash service of summons setting up as one ground that the court had no jurisdiction to order the

> publication of summons as the affidavit upon which the order was based contained facts predicated upon hearsay. The court granted the motion and vacated the default judgment. At the same time it denied appellee's motion to dismiss and appellants' motion to file additional affidavits concerning the attempted service. Appellants appeal from the order of the district court except insofar as it denies the motion to dismiss the action." (R. 110, 111.)

proceeds to decide the question whether a hearsay or "information and belief" affidavit is sufficient under California law, upon which to base an order for publication of summons. (R. 111, 112; 138 Fed. (2d) 375.)

The Court of Appeals reversed the District Court, holding that under California law an order based upon a hearsay affidavit was sufficient, saying:

> "It seems evident that in California an affidavit based on information and belief would support an order for publication of summons. Two California Supreme Court decisions very definitely hold that the hearsay nature of facts stated in an affidavit may be considered by the judge in drawing his conclusion as to due diligence, but that such a hearsay affidavit does not automatically render the judgment void. Rue v. Quinn, 137 Cal. 651; Ligare v. California Southern Rr. Co., 76 Cal. 610. *Directly contra to this principle is Kahn v. Matthai, 115 Cal. 689, and perhaps Columbia Screw Co. v. Warner Lock Co., 138 Cal. 445.*" (R. 112.) (The language emphasized was later eliminated as stated below, and therefore is not in the Record.)

On petition for rehearing petitioner herein called to the attention of the Court of Appeals the fact that the California cases cited in the above-quoted portion of the opinion, as "perhaps" holding that a judgment based upon a hearsay affidavit would be void, were later in point of time than the decisions in *Rue v. Quinn* and *Ligare v. California Southern Rr. Co.*, relied on by the Court. A rehearing was denied, but the Court modified the judgment by adding a paragraph to the effect that the said later decision did not hold that such an order was void, but only that it was void under a direct attack. (R. 112, 113; 138 Fed. (2d) 373 at 376, Syl. 6.)

It would be strange, indeed, if a person who *appeared* in a case, in which judgment went against her, could by appeal attack a default judgment on the ground that the affidavit was hearsay, but one who was served by publication and who did not discover the existence of the judgment until long after the appeal period had passed, could not attack the judgment on that ground.

THE DECISION OF THE CIRCUIT COURT AS TO CALIFORNIA LAW ON THE SUBJECT IS DIRECTLY CONTRARY TO THE DECISIONS OF THE CALIFORNIA COURTS.

The Court of Appeals, relying on *Galpin v. Page*, 85 U. S. 350, and *Braly v. Seaman*, 30 Cal. 610, correctly holds that a statute such as the one under interpretation must be *strictly* construed (R. 112), and it likewise correctly declares that:

> "it is a basic rule that a judgment is void and subject to collateral attack if a lack of jurisdiction in the Court appears on the face of the record." (R. 112.)

In the latest California decision, cited in the opinion, namely, *Columbia Screw Co. v. Warner Lock Co.,* 138 Cal. 445, the California Supreme Court was considering the sufficiency of an affidavit based upon hearsay and it was called upon to determine whether such an affidavit could, under Section 412 of the California Code of Civil Procedure, give the trial Court jurisdiction to make an order for publication of summons—the identical point involved in the case at bar. The Court, after declaring that

> "when the statute uses the words 'appear by affidavit' it means more than an affidavit as to what some one told the party making the affidavit",

held that the "order being void, the attempted service by publication is void" (p. 447), and that the Court not having acquired jurisdiction of the defendant could not enforce the judgment in any manner. (p. 448.)

In *Kahn v. Matthai,* 115 Cal. 689, the affidavit for the order of publication contained facts reported to affiant by five process servers or investigators hired to search for and serve the defendant. The California Supreme Court held that:

> "the affidavit was insufficient to uphold the order of publication of summons and hence that the court below failed to obtain jurisdiction of the person of the defendant." (p. 693.)

That decision calls attention to the fact that under Section 670 of the California Code of Civil Procedure, since 1895, the affidavit for publication and the order for publication of summons constitute a part of the judgment roll. Therefore if an affidavit is hearsay, the defect appears on the face of the judgment roll.

The following cases hold that where the lack of jurisdiction of the person appears on the face of the record, the resultant judgment is an absolute nullity.

Earle v. McVeigh, 91 U. S. 503;
Thompson v. Whitman, 18 Wall. 457;
Harris v. Hardeman, 14 How. 334.

THE PETITION IS IN TIME.

The decision of the Circuit Court of Appeals in this case was rendered on September 8, 1943. The Court denied a rehearing on November 3, 1943, thus giving finality to the judgment as of that date.

THIS COURT'S JURISDICTION TO HEAR PETITION.

This Court's jurisdiction to hear and determine this petition is found in Rule 35, subd. 5(b), which provides for review on certiorari, where

> "A Circuit Court of Appeals has decided an important question of local law in a way probably in conflict with applicable local decisions."

That there is involved here an important question of local law is evidenced by the following facts:

Section 413 of the *Code of Civil Procedure of California* provides, with reference to the place of publication of a summons, as follows:

> "The Order must direct the publication to be made in a newspaper, to be named and designated as most likely to give notice to the person to be served. * * *"

It is a universal custom among trial Courts to order publication in the local legal newspaper, as was done in the present case. (R. 61, 70.) Of course, a legal newspaper is not one "most likely to give notice". On the contrary, it is a very safe place to hide the publication from the person to be served. It is a safe thing to say, that no one but the newspaper proof reader and an occasional representative of a credit association ever reads the summons published in a legal newspaper.

The power of this Court to exercise jurisdiction of this petition is found in Section 240 (a) of the Judicial Code, as amended. 28 U. S. C. A. 347(a).

CONCLUSION.

If the decision of the Circuit Court of Appeals is permitted to stand, District Courts situated in California will be induced by its precedent to give validity to judgments, the existence of which was not even suspected by the judgment debtors, and to do so under a misapprehension of California law, in a matter in which California law is declared to apply.

The granting of the writ and the reversal of the Court of Appeals' decision would correct the error, re-establish the proper precedent, and relieve petitioner from the burden of a judgment which should never have been rendered against her.

Dated, San Francisco, California,
January 24, 1944.

Respectfully submitted,
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